IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-478

PARKER SEAL COMPANY,

Petitioner,

v.

PAUL CUMMINS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

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INTEREST OF AMICUS

Americans United for Separation of Church and State is a nonprofit educational corporation organized under the laws of the District of Columbia with national headquarters in the Washington D.C. area, with some 90,000 members in all the states of the United States. Its sole chartered purpose is to preserve the principle of separation of church and state as set forth in the First Amendment to the Constitution of the United States

and in the Constitutions of the several states, and to assist in the preservation of constitutional rights respecting this principle to the end of preserving religious liberty for the people of the United States.

Americans United for Separation of Church and State, popularly known as "Americans United" has members who are Sabbatarians and is especially concerned over developments which would infringe upon the religious liberties of such Sabbatarians in their relationships with the federal, state and local governments, with their employers and with their fellow citizens.

This amicus brief takes the position that § 703(a)(1) of the Civil Rights Act of 1964, and § 701(j) of the Civil Rights Act of 1964 as amended and which are found at 42 U.S.C.A. § 2000e-2(a)(1) and 42 U.S.C.A. § 2000e(j) respectively, are constitutional. This position is not motivated by any prejudice pro or con for any partiuclar church or for any particular religion. As the Maryland Court of Appeals said in *Horace Mann League.* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51 (1966):

> "It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone."

Therefore, it is Americans United's task to assist the Court in resolving the constitutional issue which is presented in this case and to promote the cause of religious liberty for all persons wherever they may be.

STATUTE INVOLVED

The statutory provision involved in this suit is § 703(a)(1) of the Civil Rights Act of 1964, as amended and § 701(j) of the Civil Rights Act of 1964, as amended, which are collectively known as Title VII of the 1964 Civil Rights Act, as amended.

THE QUESTIONS PRESENTED

The final questions presented by the petitoner in this appeal are as follows:

(1) Whether the statute and guidelines which require an employer to accord preferential treatment to selected employees solely on the basis of their religious beliefs, violate the Establishment Clause of the First Amendment.

(2) Whether the Court of Appeals erred in determining that an employer which has tried, unsuccessfully, to accommodate an employee who refuses to work regularly scheduled Saturdays is barred from showing that its continued efforts impose undue hardship.

Amicus believes that the overriding question for the Court to determine is whether or not the Congress of the United States has the constitutional power to safeguard the religious liberty of an individual from infringement by a fellow citizen and, more specifically, his employer.

STATEMENT OF THE CASE

Paul Cummins, respondent, was employed by Parker Seal Company, petitioner, in 1958 and worked as a production scheduler until May of 1965 when he was made a supervisor. In July of 1970, respondent joined the World Wide Church of God, which forbids work on the Sabbath (Friday sundown to Saturday sundown) and on certain holy days. From the time respondent joined the World Wide Church of God, he refused to work on Saturdays. After approximately one year of accommodation and after complaints arose from fellow supervisors who were forced to substitute for him on Saturdays, the respondent was discharged.

After filing charges with the Economic Employment Opportunity Commission and a similar complaint with the Kentucky Commission on Human Rights, an action was filed in the United States District Court for the Eastern District of Kentucky, Lexington Division. After the dismissal of the complaint, appeal was made to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals reversed and remanded.

Parker Seal Company filed a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit which was granted by this court.

The issue brought before the Court, among others, is the claim by petitioner that the Civil Rights Act of 1964 as amended and the EEOC guidelines violate the Establishment Clause of the First Amendment of the Constitution of the United States of America:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . . ."

SUMMARY OF ARGUMENT

That portion of the Civil Rights Act which bars discrimination because of religion is not an Establishment of Religion in Violation of the First Amendment of the Constitution of the United States of America.

The First Amendment and the Fourteenth Amendment apply only to Federal and State Government acts which include either *Sponsorship, Financial Support* or *Active Involvement* of the Sovereign in Religious Activity. The Act in question does none of these and only grants a remedy to an individual whose rights have been infringed by his employer. This the Congress can surely do as long as the rights granted are within the framework of the Due Process Clause.

ARGUMENT

Amicus will focus its Brief on the constitutionality of the Civil Rights Act which bars discrimination because of individual's . . . religion. . . .

Petitioner questions the consitutionality of 29 CFR § 1605.1-(1974) and 42 U.S.C. § 2000e(j) as laws "respecting an establishment of religion" as a violation of the First Amendment of the Constitution of the United States of America.

Amicus wishes to point out to the Court that the First Amendment does not make the grant of religious freedom, but merely protects it from being interfered with by the federal government by specifically prohibiting the Congress from making a law respecting an establishment of religion or a law prohibiting the Congress from making a law respecting an establishment of religion or a law prohibiting the free exercise thereof. This has been interpreted in all cases as preventing sponsorship, financial support by, and active involvement of the federal government in religious activity. See *Walz* v. *Tax Commission* 397 U.S. 644 (1970) where Chief Justice Burger stated "It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." See *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) and *Everson* v. *Board of Education*, 330 U.S. 1; *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Bradley* v. *School Board*, 416 U.S. 696 (1974); *Braunfield* v. *Brown*, 366 U.S. 599 (1961); *Committee of Public Education* v. *Nyquist*, 413 U.S. 756 (1973); and *Gillette* v. *United States*, 401 U.S. 437 (1971); *Meek* v. *Pittenger*, 421 U.S. 349 (1975) and the cases cited therein.

The Act under consideration contains no financial support, creates no active involvement of the Sovereign in any form of religious activity. The only possible religious activity involved is the free exercise of the individual freeing him from unreasonable interference and coercion by his employer, thus allowing him the freedom to attend his chosen church on its designated Sabbath.

For an historical view of the First Amendment, see *George Reynolds* v. *United States*, 98 U.S. 244, 249.

In *Reynolds* the Court, in studying the historic background of the First Amendment, recited several quotes from Mr. Madison's *Memorial and Remonstrance* and from Mr. Jefferson's works regarding a bill before the Virginia House of Delegates in 1784, "A bill establishing provisons for teachers of the Christian religion." At the session when this bill was defeated, a bill was introduced by Mr. Jefferson, "for establishing religious freedom." In the preamble of this Act . . . religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tenancy, is a dangerous fallacy which at once destroys all religious liberty."

It is declared "that it is time enough for the rightful purposes of civil governemtn for its officers to interfere when principles break out into overt acts against peace and good order." Further quoting from Jefferson's works, the Court said: "Believing with you that religion is a manner which lies solely between man and his God; that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof', thus building a wall of separation between church and state. Adhering to this expression of the Supreme will of the nation in behalf of the rights of conscience, I shall seek, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in oppostion to his social duties."

The Declaration of Independence states "...that they [all men] are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness...."

James Madison stated that "...the right of every man is to liberty..." and not merely to toleration. Mr. Madison was successful in getting the word "toleration" in the 1776 Virginia Bill of Rights modified to read "all men are equally entitled to the free exercise of religion according to the dictates of Conscience."

Personal Liberty, or the right of the enjoyment of Life and Liberty, is one of the fundamental or Natural rights of mankind and is not derived from or dependent on the Federal Constitution, but is one of the most Sacred and Valuable rights, and this right is considered to be inalienable. See 16 C.J.S. Sec. 202, p. 987.

The elementary rights of Life, Liberty and Property, are the Natural rights of men and existed before the adoption of the Constitution.

The first ten amendment to the Federal Constitution, being limitations on the Federal Government only, were not intended to

lay down any novel principles of government, but simply embodied certain guaranties and immunities which we had inherited from our English ancestors. See C.J.S. Sec. 200, p. 984.

In view of their origin and long use the principles contained in the Bill of Rights cannot be regarded as new matters or new proscriptions. The purpose of the Bill of Rights was to preserve ancient principles from government interference. See 16 C.J.S. Sec. 27, p. 100.

The basic principle of our constitutional system is that all political power is inherent in the people and the governemnt has such power as the people grant to it. Therefore the rights are those of the people and not rights established by government. A Constitutional right differs from a right conferred by the Common law or by statute only in the fact that it is guarded from attack or interference by the legislature, or any other governmental agent of the states. See 16 C.J.S. Sec. 199.

The entire social and political structure of the United States rests on the cornerstone that all men have certain basic rights which are inherent and inalienable.

The purpose of the Bill of Rights was to withdraw these subjects from the vicissitudes of political controversy and to place them beyond the reach of majorities and governmental officials. They are left then as legal principles to be applied by the Courts. See 16 C.J.S. Sec. 199.

The right to worship is considered to be one of the principles included in the word "Liberty" as set forth in the Declaration of Independence and is most adequately set forth in 16 C.J.S. Sec. 206(1) p. 1017 as follows:

> "The right to worship according to the dictates of one's own conscience and reason and to be free from molestation or restraint in his person, liberty, or estate in such worship, is a natural, fundamental, and inalienable right, available to every individual, provided he does not disturb others. The right is not subject of a direct constitutional grant. This right is fundamental in a free government as is the right to life, liberty, or the pursuit of happiness.

"The people of the various states, and of the United States, as a political entity, have no creed or religion. Freedom of worship is constitutionally recognized and confirmed as an attribute of liberty incident to all persons under the constitution and laws of the United States, regardless of their citizenship. Article 6 of the Constitution of the United States provides that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,' and, by the First Amendment, it is further provided that 'congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"

These provisions effectively guarantee the religious liberty of the individual against infringement by the Federal Government, or agencies of the Federal Government and the Fourteenth Amendment prohibits the making or enforcing of laws which abridge privileges or immunities, and deprivation of Life, Liberty or Property without due process of law . . . and provides protection of the individual against infringement of the rights by the State Government.

Neither the provisions of the Bill of Rights nor the Fourteenth Amendment constitute any protection against action by private individuals, or protect individual rights from individual invasion. See 16 C.J.S. Sec. 69 p. 185. Also see 16 C.J.S. Sec. 206(1) p. 1023 which states as follows:

"...These guaranties are limitations on the powers of the government, and not on the rights of the governed; they proscribe governmental action, and do not bind the actions of private corporations or organizations, and have no bearing on individual actions or transactions..."

The courts have also had occasion to state that these protections do not apply to individual actions. See the following:

"Purpose of the Free Exercise Clause of this amendment is to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority. *School Dist. of*

Abington Tp., Pa. v. *Schempp, Md. & Pa.* 374 U.S. 203, 83 S. Ct. 1560, 10 L.Ed. 2nd 844 (1963).

"'Freedom of worship' is not the subject of direct constitutional grant, but it is constitutionally recognized and confirmed as an attribute of liberty incident to all persons under Constitution and laws of the United States regardless of their citizenship, and, as such, it is secured by this clause against abridgment by Congress and by Amend. 14 against deprivation by a state without due process of law." *Douglas* v. *City of Jeannette, Pa.*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324.

"This amendment was designed to provide a bulwark against those who wish to impose their religious beliefs upon others through government action.' *DeSpain* v. *DeKalb County Community School Dist.* 428 C.A.Ill. 1967, 384 F.2d 836. Certiorari denied, 390 U.S. 906, 88 S.Ct. 815, 19 L.Ed. 2d 873.

"Constitutional provisions relating to religion proscribe governmental action and do not erect shield against merely private conduct, however discriminatory or wrongful." *Carr* v. *St. John's University, New York*, 1962, 231 N.Y.S. 2d 403, 34 Misc. 2d 319, reversed on other grounds, 231 N.Y.S. 2d 410, 17 A.D. 2d 632, affirmed 235 N.Y.S. 2d 834, 12 N.Y. 2d 802, 187 N.E. 2d 18.

"This amendment is a limitation upon the power of Congress, and has no effect upon the transactions of individual citizens." *U.S. Nat. Bank of Portland* v. *Snodgrass*, 1954, 275 P. 2d 860, 202 Or. 530, 50 A.L.R. 2d 725.

"This amendment prohibiting Congress from making a law prohibiting the free exercise of a religion, or abridging freedom of speech, binds only the action of Congress or of agencies of the federal government and not the actions of private corporations." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co., C.A. Mass.* 1950, 183 F.2d 497.

"This clause prohibits state from depriving any person of life, liberty, or property without due process of law, but adds nothing to right of one citizen as against another." *Barrera* v. *Security Bldg. & Inv. Corp., C.A. Tex.* 1975, 519 F.2d 1166.

"This clause erects no shield against merely private conduct, however discriminatory or wrongful." *Barrera* v. *Security Bldg. & Inv. Corp.*, Id.

"This clause does not prohibit the individual invasion of individual rights." *Golden* v. *Biscayne Bay Yacht Club*, C.A.Fla. 1975, 521 F.2d 344.

"Private exercise of freedom of association must function without significant state support and involvement." Id.

"This clause prohibits discriminatory action by state but erects no shield against private conduct, however discriminatory or wrongful." *Jones* v. *Tennessee Eastman Co., D.C.* Tenn. 1974, 397 F.Supp. 815, affirmed 519 F.2d 1402.

It appears clear that the Establishment and Free Exercise Clause of the First Amendment applies only to the Federal Government and was never intended to apply to individual actions.

It also appears clear that the Establishment and Free Exercise Clause of the First Amendment was intended to afford protection against sponsorship, financial support, and active involvement of the sovereign in religious activity. See *Early* v. *DiCenso* (1971) 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed. 2d 745. This Court stated in *Gillette* v. *U.S.* (1971) 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed. 2d 168 that the "central purpose of the establishment clause of this amendment is to insure governmental neutrality in matters of religion."

The Court in *Walz* in 1970 stated that:

> "Under this amendment, neither governmentally established religion nor governmental interference with religion will be tolerated, but, short of those expressly proscribed governmental acts, there is room for a benevolent neutrality

> permitting religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission of City of New York*, N.Y. 1970, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697.

The foregoing make it clear that the Establishment and Free Exercise Clauses of the First Amendment do not apply to the acts of individuals.

It is also clear that government does not reach the point of violating the Establishment Clause where there is no government activity which would be classed as sponsoring, financial support and/or active involvement in religious activity.

The statutes and guidelines involved in this case have none of these attributes and do nothing more than to afford a remedy to an individual who has had his fundamental right to Free Exercise of Religion interfered with, not by government but by a person (corporation is an artificial being created by law). As clearly indicated above, an individual had no protection from such intereference except as the criminal law applied.

It should also be mentioned that the statutes involved apply to all persons alike, not just the World Wide Church of God, which is before the Court, or just those who are Sabbatarians. This is true notwithstanding the comments of Mr. Randolph as sponsor of the amendment to include religion in the Civil Rights Act of 1964 as amended.

It is therefore the position of Amicus that the statutes and guidelines in question are not an establishment of religion, but are extensions of the Civil Rights Act, which give individuals a right of redress against those who would interfere with those "*inalienable rights of Life, Liberty, and the Pursuit of Happiness.*"

We know that the First Amendment and the Fourteenth Amendment with the help of the Courts protect us from having our Religious Liberty eroded by Congress and the States.

The question before the Court in this case is whether Congress can pass a law to protect us from each other?

It would, we think, be absurd to think otherwise, for if Government does not have the power to protect an individual from the acts of another individual it lacks the power to continue in existence. Without government protection there is no freedom. And as Emerson asked:

> "For what avail the plough or sail
> Or land, or life, if freedom fail?"

Corpus Juris Secundum further answers our question at 14 C.J.S. Supp. Civil Rights Sec. 4, as follows:

> "Civil Rights legislation enacted by Congress has generally been held to be as constitutional . . .
>
> "The Acts of Congress which are collectively known as the Civil Rights Acts, are regarded as a valid exercise of the power conferred on Congress, particularly by the Thirteenth Amendment, and any doubts as to the power of Congress to enact such legislation was resolved by the adoption of the Fourteenth Amendment.
>
> "Congress has the power to enforce provisions of the Fourteenth Amendment against persons representing the state whether they act in accordance with their authority or misuse it, and it has the power under the Fourteenth Amendment to reach purely private acts of racial discrimination which are violative of the Civil Rights Acts.
>
> "Provisions of the Civil Rights Act of 1964, create new categories of civil rights, and these provisions reach any person and any action which interferes with the enjoyment of the civil rights secured by the statute.
>
> "While it has been held that a criminal statute which prohibits discrimination with respect to a particular class creates civil rights in the members of the class, the statute denouncing the offense of depriving citizens of rights protected by the Constitution and laws does not confer rights, privileges, or immunities upon an individual, but merely safeguards those rights which he possesses by making violation of them a crime."

In regard to the validity of a statute, Corpus Juris Secundum states:

> "It may be stated as a general rule that the validity of a state statute depends on whether or not it attempts to validate and legalize action or a course of conduct which the constitution forbids. More specifically, in view of the rules, generally recognized, as to the nature of a state constitution, and as to the powers of a state legislature, set forth *supra* § 70, rules usually recognized and applied are that, in so far as the state constitution is concerned, the question is not as to whether the power to enact the statute has been granted, but is as to whether power has been prohibited or denied by such constitution, and that the only test of the validity of an act regularly passed by a state legislature is whether or not it violates limitations or prohibitions imposed by the state or federal constitutions in express terms or by implication." See 16 C.J.S. § 71, p. 210.

The statutory scheme here involved does not, as previously shown, violate the Constitutional prohibition against the Establishment of a Religion.

This court said in *Watson* v. *Jones* that:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and *which does not infringe personal rights*, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect." (emphasis added) *Watson* v. *Jones*, Ky., 13 Wall, 679, 728.

The granting of rights under the Civil Rights Acts does infringe upon the personal rights of others whom are involved and the property rights of the employers who will of necessity have to make some accommodations.

The granting of Rights to one person will nearly always infringe on the wishes of others. However, courts have in cases similar

to this stated that "no vested rights are impaired by statute which creates a remedy for an existing right for which there has been no remedy (see *State* v. *Standard Oil Co. of Louisiana*, 178 So. 601, 611, 613). Acts providing a new remedy, or enlarging on existing remedy does not impair any vested rights. (see *Cronheim* v. *Loveman*, 142 So. 550 also 16 C.J.S. Sec. 257 p. 1251).

Even though the employer had no vested rights under *State* v. *Standard Oil Co. of Louisiana* and *Cronheim* v. *Loveman* we concede that there must be a balancing of rights under the principle of "Due Process of Law."

Due Process is not a rigid and inflexible formula but is an elusive concept which varies according with the factual context. See *Expert Elect., Inc.* v. *Levine*, D.C.N.Y. 1975, 339 F.Supp. 893. See also *Matter of Valdez*, N.M. 1975, 540 P.2d 818. Minimum Due Process is neither inflexible nor graven in stone, (*U.S. ex.rel. Richardson* v. *Wolff*, C.A.Ill. 1975, 525 F.2d 797.) but is a concept premised on fairness and reasonableness in light of total circumstances. See *Ingraham* v. *Wright*, C.A.Fla. 1976, 525 F. 2d. 909. The clause only requires a balance between what may be conflicting interest in order to arrive at what is substantially fair and just (see *Bradford* v. *Weinstein*, C.A.N.C. 1974, 519 F.2d 128, Certiorari granted 95 S.Ct. 2394).

Amicus will not address itself to the merits of the Due Process of the particular facts of this case except to say that the burden of compliance with this act should not fall wholly on either party.

It appears to us that discharge without accommodation is violating the Due Process Rights of the employee and making his insistence upon exercising his "Religious Liberty" or being without a livelihood is placing too great a burden on "Religious Liberty" and violating Due Process of Law as well as the statutory guarantee of "Religious Liberty."

On the other hand, to require the employer to pay an individual for not working or for time off to attend worship services would place an equally unacceptable burden on the employer. It appears that a balance must be had in order to do justice to all parties under the "Due Process Clause."

CONCLUSION

For the reasons stated above, the Court should affirm the Judgment of the United States Court of Appeals for the Sixth Circuit, with opinion on the principles of constitutional law involved.

Respectfully submitted,

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